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Supreme Court of the United States

OCTOBER TERM, 1936

MRS. JOHN S. MEADOWS,
Petitioner,

against

IRVING TRUST COMPANY, as Trustee of United Cigar Stores Company of America, Debtor, *et als.*,
Respondents.

No. 151

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRUSTEE

OPINIONS BELOW

The Special Master and the District Court rendered no opinions. The opinion of the Circuit Court of Appeals is reported in 83 Fed. (2d) 207, the concurring opinion of Judge A. N. Hand appearing at page 209.

STATUTE INVOLVED

Section 77B of the Bankruptcy Act provides, in subdivision (b) (10),

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise consti-

tute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. For all purposes of this section unsecured claims which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and of other claims, if any, of equal rank, shall be treated as a separate class of creditors. In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *."

[Bankruptcy Act of July 1, 1898, as amended, Section 77B (b) (10); 11 U. S. C. A. Sec. 207 (b) (10)]

STATEMENT

The decision of the United States Circuit Court of Appeals for the Second Circuit, now before this Court for review, affirmed an order of the United States District Court for the Southern District of New York expunging that part of a claim filed by the petitioner, a former landlord of United Cigar Stores Company of America (hereinafter referred to as the Debtor), which sought recovery for loss of future rents and damages for alleged breach of a building covenant.

The claim was based on a 99-year net lease of property in Lincoln, Nebraska, made to the Debtor in 1922 (R. 6-28). Besides covenanting to pay taxes and insurance and to keep the demised premises in good repair (R. 8, 15), the Debtor agreed that by July 1, 1942, it would demolish the existing building on the premises and erect in its stead a new four-story structure (R. 10).

On August 29, 1932, the Debtor was adjudicated bankrupt upon its voluntary petition in the Southern District of New York. The Debtor was then occupying a store in the leased premises, and sub-letting the remaining space to other tenants (R. 81, 97). The Trustee in Bankruptcy, having found the lease burdensome, moved the Bankruptcy Court for leave either to reject it, or, in the alternative, to assign it to the petitioner or her nominee (R. 97-106). The petitioner chose the assignment to her nominee, Frelem Realty Corporation, and such assignment was effected by an agreement dated December 16, 1932, joined in by the Debtor (R. 60-65).

The petitioner at the same time made a separate agreement with Frelem Realty Corporation, effective upon its acquiring the lease by assignment from the Debtor, whereby

(i) the lease was assumed by the assignee, (ii) the term cut down so as to expire in 1937 instead of 2021, (iii) the annual net rental reduced by one-third, and (iv) all provisions for the demolition of the existing building and the erection of a new one deleted (R. 127-133). There is nothing in the record to indicate that, as so assigned and modified, the lease has not been and is not still being fully performed.

In addition to assigning the Debtor's lease to Frelem Realty Corporation, the agreement of December 16, 1932, provided for turning over to the assignee the subleases and the rents thereunder accrued and to accrue from and after September 1, 1932, the first rent day following the Debtor's bankruptcy (R. 61). The insurance policies affecting the premises were also transferred to the assignee (R. 63). Finally, the petitioner herself agreed to assume all existing and future obligations of the Debtor under the lease (R. 62), and released the Trustee, the bankrupt estate and the Bankrupt [the Debtor] from all claims with respect to the lease, except that the petitioner did not waive

> "the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled * * *" (R. 62).

After the execution of these two agreements, the petitioner filed in the prior bankruptcy proceedings of the Debtor, and refiled over a year and one-half later in the present reorganization proceedings (which were commenced on June 9, 1934 upon the enactment of Section 77B)[1], a claim for (1) back taxes and the cost of repairs

[1]The Debtor filed its petition for reorganization on June 9, 1934, and on June 14, 1934 Irving Trust Company was appointed Trustee of the Debtor's estate and in such capacity holds and administers the property formerly of the Debtor (R. 32).

with respect to which the Debtor's liability had accrued *prior to* bankruptcy and the assignment of the lease to the petitioner's nominee,[2] and for unliquidated damages for (2) loss of future rent to accrue *after* the Debtor's bankruptcy, and (3) alleged anticipatory breach of the covenant to build in 1942.

On these facts the judges in the Court below were unanimous in holding that the petitioner was not entitled to claim for either of the latter two items in the Debtor's reorganization proceedings under Section 77B. Two of the judges based their decision on the assignment agreement of December 16, 1936 with the Trustee and the Debtor, whereby the petitioner was held to have accepted a surrender of the lease to her nominee and assumed the Debtor's obligations thereunder. The third judge relied upon a provision in the lease that on its termination for default by the tenant the transfer to the landlord of the improvements, accrued rents and insurance policies should constitute liquidated damages.

SUMMARY OF ARGUMENT

I

The petitioner has no claim under the statute [Section 77B(b)(10)] either "for injury resulting from the rejection of an unexpired lease" or "for damages or indemnity under a covenant contained in such lease".

(A) The petitioner is not a "person injured" by the rejection of a lease.

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[2]These items are concededly allowable in the amount of $7,661.73 and are not now in dispute (R. 36, 169).

(B) The provision of the statute referring to the claim of a landlord for damages or indemnity under a covenant contained in a lease does not apply here, because—

1. The petitioner's lease made no provision for continuing liability on the part of the Debtor once its interest as tenant should cease.

2. The assignment of the lease to the petitioner's nominee and her acceptance of such nominee as tenant in place of the Debtor constituted a surrender of the lease ending any further liability on the part of the Debtor.

3. The petitioner assumed all obligations of the Debtor under the lease, leaving her the obligor as well as the obligee of the claim which she is now making.

II

On any theory of the petitioner's rights her claim for damages is conclusively barred by the general release contained in the assignment agreement.

III

Damages for alleged breach of the building covenant do not come within the exception to the release and are not allowable under any circumstances.

ARGUMENT

I

THE PETITIONER HAS NO CLAIM UNDER THE STATUTE [SECTION 77B(b)(10)] EITHER "FOR INJURY RESULTING FROM THE REJECTION OF AN UNEXPIRED LEASE" OR "FOR DAMAGES OR INDEMNITY UNDER A COVENANT CONTAINED IN SUCH LEASE".

(A) The petitioner is not a "person injured" by the rejection of a lease.

The court below has held in a companion case, *In re United Cigar Stores Company* (City Bank Farmers Trust Co.), 83 Fed. (2d) 209,[3] that the rejection of a lease in the prior bankruptcy proceedings of the Debtor does not, *without more,* constitute the basis of a claim under subsequently enacted Section 77B. In the present case, however, this question was not raised, as the court considered the petitioner's lease never to have been rejected (R. 182).

The sole basis for the petitioner's contention to the contrary consists of certain erroneous statements contained in recitals in the use and occupation agreement (R. 126) and in the assignment agreement (R. 61), entered into between the Trustee in Bankruptcy and the petitioner, which referred to the lease as having been disaffirmed. Actually no rejection or disaffirmance (which could only be effected by written notice—R. 107) took place. Instead, the Trus-

[3]Also before this Court on writ of certiorari (No. 260), and assigned for argument immediately following the instant cause.

tee in Bankruptcy proceeded under the alternative provision in the court order (R. 108) by causing the lease to be assigned to the petitioner's nominee, and the incorrect language in the assignment agreement as originally executed, *i. e.*

> "Pursuant to said order the Trustee rejected the Lease on November 10, 1932, the Landlord not having theretofore requested such assignment" (fol. 61),

was subsequently deleted by an amendatory agreement (R. 65-67).

For her claim to prevail the petitioner must therefore establish that when Section 77B was enacted, and the reorganization proceedings of the Debtor thereunder commenced, she had a valid and subsisting cause of action against the Debtor (other than for mere rejection of her lease).

(B) The provision of the statute referring to the claim of a landlord for damages or indemnity under a covenant contained in a lease does not apply here, because—

1. *The petitioner's lease made no provision for continuing liability on the part of the Debtor once its interest as tenant should cease.*

The Debtor covenanted in the lease that, in the event of default and of consequent termination of the lease by the petitioner, the Debtor would deliver up possession (R. 19). The lease further provided that upon such termina-

tion of the lessee's interest all insurance policies and all of the Debtor's interest in the leasehold improvements and the rents accrued and to accrue should "pass to and become the property of" the petitioner (R. 19). This was precisely what happened after the Debtor's bankruptcy when, at the petitioner's request (R. 61, 106), the property was turned over to her nominee, together with the rents accrued and to accrue from sub-tenants and the insurance policies affecting the property (R. 61, 63).

The lease contained no indemnity covenant or other damage clause creating any liability on the part of the Debtor which would survive termination of its interest in the property, the parties agreeing instead that the vesting in the lessor of the leasehold improvements and the accrued rents "without compensation therefor being made to" the lessee, should be considered

> "Not as a penalty or forfeiture or as of the nature of a penalty or forfeiture but as a contract right and a liquidated damage to the lessor due to such default by the said lessee hereby fixed and agreed upon by parties hereto. Both parties hereto recognizing the impossibility of precisely ascertaining the amount of damage sustained by the lessor in consequence of such default and both parties desiring to obviate any question or dispute concerning the amount of such damages." (R. 19; *sic.*).

Thus the manner in which the petitioner's lease was dealt with after the Debtor's bankruptcy did not constitute a departure from its provisions, and (except for the back taxes and repairs allowed to her below) she received,

through her nominee, all that she contracted for in the event of default.[4]

2. The assignment of the lease to the petitioner's nominee and her acceptance of such nominee as tenant in place of the Debtor constituted a surrender of the lease ending any further liability on the part of the Debtor.

The assignment agreement dated December 16, 1932, which was entered into between the Trustee in Bankruptcy, the petitioner and the Debtor, provided for the assignment of the lease and the subleases thereunder to Frelem Realty Corporation, the petitioner's nominee (R. 61). Effective upon such assignment, the petitioner agreed with the assignee to modify the lease with respect to rental and term and by striking out entirely the building covenant. At the same time the assignee expressly assumed "the performance of all obligations and covenants on the part of the lessee to be performed" under the lease from and after the effective date of the assignment (R. 131).

On the face of these two agreements, it can scarcely be contended that the lease was intended to or did survive as to the Debtor for any purpose. The legal effect of such agreements (quite apart from the provisions of the assignment agreement whereby the petitioner assumed the Debtor's obligations and expressly released the Debtor)

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[4]The fact that the Debtor was only required to furnish the petitioner with a bond in the event it wished to assign the lease (R. 21) distinguishes this case from *Kanter* v. *New Amsterdam Casualty Co.*, 195 App. Div. 756 (cited by the petitioner as negativing the effect of the liquidated damage clause in her lease), where the bond was specifically to secure the making of certain alterations. At any rate, when the petitioner requested the Debtor to assign the lease to her nominee she effectually waived compliance by the Debtor with the covenant for a bond.

was definitely to bring to an end the Debtor's obligations as tenant of the petitioner. By accepting the substitution of tenants thus brought about, followed by the modification of the lease as assigned, the petitioner unreservedly gave up all further rights to hold the Debtor, her original tenant, to the lease.[5] At the very least, the lease was modified and, as such, assumed and performed by another. As said in an earlier decision by the Circuit Court of Appeals for the Second Circuit

> "But the lessor may not safely agree with the lessee and a substitute that the substitute shall come in under a new lease, unless (we may for argument assume), he reserves his rights against the lessee. Certainly if he does not, it is a release of the lessee, and the lessor can look only to the substitute. * * *" *T. A. D. Jones Co.* v. *Winchester Repeating Arms Co.*, 61 Fed. (2d) 774, 775, cert. den. 288 U. S. 609.

Moreover, the assignment of the lease and the turnover of the property to the new tenant provided all the elements of a surrender both by express agreement and by operation of law. *Beall* v. *White*, 94 U. S. 382, 389; *McAdam on Landlord and Tenant*, §§ 318-322; *Tiffany, Real Property* (2d ed.), § 431. First, there was the clear intention on the part of the Debtor to relinquish all interest in the leasehold from the effective date of the agreement, together with the expressed willingness of the petitioner to take back her property through a nominee. Secondly, by accepting the nominee as a new tenant in place of the Debtor and by modifying the lease as assigned, the petitioner was conducting

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[5]The rider attached to the release provision in the assignment agreement to negative the waiver of claims provable in bankruptcy (discussed *infra* at page 13), was by its terms applicable only to the release paragraph (Article Fourth), and hence not applicable to the other paragraphs of the agreement providing for the assignment and assumption.

herself in a manner wholly inconsistent with the continuance of liability under the lease on the part of the Debtor. *Lamson Consol. Store Service* v. *Bowland*, 114 Fed. 639, 641, C. C. A 6th; *Watson* v. *Merrill*, 136 Fed. 359, 362, C. C. A. 8th; *In re Sherwoods Inc.*, 210 Fed. 754, 759, C. C. A. 2d.

3. *The petitioner assumed all obligations of the Debtor under the lease, leaving her the obligor as well as the obligee of the claim which she is now making.*

By the assignment agreement of December 16, 1932, the petitioner herself assumed and undertook

> "to perform all existing and future obligations, terms and conditions required under the provisions of the Lease * *** to be performed on the part of the Bankrupt" (R. 62).

Thus, there remains no obligation on the part of the Debtor to the petitioner upon which a claim could possibly be founded. Clearly the petitioner cannot sue on an obligation which she herself was required to perform.

II

ON ANY THEORY OF THE PETITIONER'S RIGHTS HER CLAIM FOR DAMAGES IS CONCLUSIVELY BARRED BY THE RELEASE CONTAINED IN THE ASSIGNMENT AGREEMENT.

Besides having exhausted the remedies under her lease by requesting the turnover of her property to her nominee after the Debtor's bankruptcy and by accepting a substitution of tenants, the petitioner expressly discharged the Debtor from "any and all liability of any nature with re-

spect to the Lease" (R. 62). To the paragraph in the assignment agreement containing this blanket release there was added *but one qualification,* which provided that nothing *in such paragraph* should be deemed a waiver by the petitioner.

> "of the right to prove against the bankrupt estate any provable claims to which the Bankruptcy Court may adjudge the Landlord [the petitioner] is entitled but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance" (R. 62).

The purpose of this qualification of the release clause was to preserve to the landlord claims which had accrued, or were said to have accrued, at the date of bankruptcy and which hence were not affected by the assignment and the assumption provisions of the agreement.

The petitioner argues, nevertheless, that this provision reserved to her the right to prove a claim for damages in the subsequently instituted proceedings under the subsequently enacted Section 77B of the Bankruptcy Act. Although the disallowance of petitioner's claim was upheld below on other grounds, just such a contention was expressly rejected by the Circuit Court of Appeals in a companion case now before this Court as No. 436, *In re United Cigar Stores Company* (Otis), 83 Fed. (2d) 202, rehearing denied 85 Fed. (2d) 211.[6]

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[6]Seven of the nine claims involved in No. 436 were disallowed because the claimants had executed assignment agreements containing riders identical with that attached to the release executed by this petitioner. The meaning and background of such riders is discussed more fully in the Trustee's brief in that case.

It is a cardinal rule of interpretation that an instrument must be "read in the light of the circumstances existing at the time of negotiations leading up to its execution." (*Miller* v. *Robertson*, 266 U. S. 243, 251.) In order therefore to interpret the meaning of the terminology used in the rider qualifying the general release of the Debtor executed by the petitioner, the Court must put itself in the situation of the parties at the time when the agreement containing the release with its qualification was being negotiated.

At that time—December, 1932—the language used had a meaning which was clearly understood by the parties to the agreement and referred to "the law then in force" (*McCullough* v. *Virginia*, 172 U. S. 102, 112). The words "bankrupt estate" meant the estate then being administered by the Trustee in Bankruptcy of the Debtor. The term "provable claims" signified any claims which at that time, under Section 63a of the Bankruptcy Act as it then read, were allowable in the Debtor's bankruptcy proceedings. The words "the Bankruptcy Court" of course referred to the court in charge of the Debtor's bankruptcy proceedings. In short, as stated by the Circuit Court in No. 436, the parties were contracting in terms of

> "the reservation of *existing* rights to be adjudicated in the future by a court of bankruptcy with reference to the provability of claims against a *then* adjudicated bankrupt that of course were provable, if at all, only when filed within the time *then* allowed and *as of the time* they were filed." (85 Fed. (2d) 12.) (Italics ours.)

Courts are, of course, "not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of" (*Harrison* v. *Fort-*

lage, 161 U. S. 57, 63). Yet to give effect to the interpretation being urged by the petitioner (*i.e.* that the rider qualifying the release preserved to her the advantage of any change in the bankruptcy law which Congress might make in the future), the Court would be required not only to do violence to the language chosen but also to disregard the context in which such language was used. For example, the words "the bankrupt estate" must be construed to mean "the *Debtor's* estate"; the words "is entitled" to mean "is *now or hereafter may become* entitled"; and the words "Trustee in Bankruptcy" to mean "Trustee in *reorganization proceedings*".

Further, the general release runs in favor of three different parties:

> (*i*) Irving Trust Company individually, and in its capacity as Receiver, and as Trustee in Bankruptcy of United Cigar Stores Company of America,
>
> (*ii*) the bankrupt estate, and
>
> (*iii*) the Bankrupt.

The qualifying rider, however, applies only to claims provable against *the bankrupt estate.*

In other words, the rider does not apply at all to the release of claims against "the Bankrupt". Yet the whole case is concerned with the question as to whether, now that "the Bankrupt" has become "the Debtor" and its stockholders have become entitled to rights in reorganization proceedings, the landlord has a claim which he would not have had prior to Section 77B. It is impossible to discern any meaning which can be given to the release of "the Bankrupt",—which release is expressly *not* qualified

by the rider,—unless it be to release such claims as might be asserted against the corporate debtor and/or the interests of its stockholders.

Moreover, as already pointed out, the legal effect of the other provisions in the assignment agreement (*i.e.*, for surrender and substitution of tenants) was to free the Debtor from further liability under the lease. It would be strange indeed if a rider added to one paragraph of the agreement should be designed to undo what was sought to be accomplished not only by the paragraph to which the rider was attached but also by the other provisions in the instrument to which the rider by its terms was not applicable. Any such extraordinary result was, in fact, specifically provided against by the clause in the rider to the effect that it should "not be deemed to render any claim a provable claim which *is* not otherwise such".

Such external evidence as there is in the record as to the intent of the parties at the time also fails to support the petitioner's contention that the rider reserved to her the right to assert claims not at the time provable, but which might be made so by subsequent legislation. From the viewpoint of the Trustee and the Debtor certainly, the rider had but one purpose and one meaning: to avoid depriving the petitioner of a valid claim for accrued taxes and repairs if properly asserted and proved, or of the opportunity to argue that claims for damages for loss of future rent were provable under the law as it then existed (R. 163, 165).[7] Manifestly, it was for similar reasons that

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[7]It was then being urged by a number of landlords in the situation of this petitioner that the doctrine enunciated by this Court in *Central Trust Company* v. *Chicago Auditorium Association,* 240 U. S. 581, allowing damages for anticipatory breach through bankruptcy of a personal contract, should be applied to leases of real property. It was

the petitioner sought a qualification of the general release, for she subsequently filed a proof of claim in the bankruptcy proceedings, part of which was in fact allowable if saved from the all-inclusive effect of the release. The petitioner also filed in the bankruptcy proceedings a claim for damages based on the alleged anticipatory breach of the building covenant, which she would have been barred from pressing by an unqualified release.

Thus, the language of the rider was chosen to accomplish the purpose which the parties had in mind at the time, namely, to afford the petitioner her day in court to establish claims which, consistent with the effect of the agreement as a whole in cutting off future claims against the Debtor and its estate, might be shown to have already accrued and become provable under the then existing law.

III

DAMAGES FOR ALLEGED BREACH OF THE BUILDING COVENANT DO NOT COME WITHIN THE EXCEPTION TO THE RELEASE AND ARE NOT ALLOWABLE UNDER ANY CIRCUMSTANCES.

The petitioner urges that her claim for damages based on the building covenant, as distinguished from loss of future rent generally, would have been provable against the Debtor's bankrupt estate under Section 63a of the Bankruptcy Act prior to its amendment in June, 1934, and hence was not caught by the release in the as-

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not until more than a year later (February 5, 1934) that this contention was finally rejected by this Court, and further uncertainty as to the provability in bankruptcy of claims for future rent dispelled as a result of the decision, in *Manhattan Properties Inc. v. Irving Trust Company*, 291 U. S. 320.

signment agreement of December 16, 1932 which admittedly was qualified to except such claims.

There are several answers to such a contention.

In the first place, no breach of the building covenant ever occurred, for the Debtor was not required to perform until *July 1, 1942.*

Secondly, the new building (if constructed on or before 1942) would not have become the petitioner's property until the year 2021, so that any damages suffered as a result of the Debtor's failure to build would be nominal at most.[8]

It was on these grounds that the non-provability under Section 63a of the Bankruptcy Act of such a claim for breach of a covenant to build was established in the only cases that have come before the Federal courts involving comparable situations; *Tipton* v. *Irving Trust Company,* 74 Fed. (2d) 45, cert. den. 295 U. S. 747 (C. C. A. 2d); *In re Schulte-United Inc.,* 2 Fed. Sup. 285, (D. C. S. D. N. Y.). The ruling in the *Tipton* case, which was based upon the decision in this Court in *Manhattan Properties Inc.* v. *Irving Trust Company,* 291 U. S. 320, was that damages for breach of a covenant to build which did not have to be fully performed *prior to* bankruptcy would be "wholly speculative and illusory" and "not a fixed liability absolutely owing at the time of the filing of the petition" (74 Fed. (2d) 46).

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[8]In *O'Brien* v. *Illinois Surety Co.,* 203 Fed. 436 (C. C. A. 6th), cited by the petitioner, the court stated (at p. 439) that "a building so promised constitutes, in effect, additional rent, payable at the end of the term, and the present worth of such future subtraction from reversion value is the primary and ordinary measure of damages." This measure was not applied in that case because of the cancellation of the lease. In the instant case, instead of being cancelled, the lease was assigned and modified and as such has apparently been performed.

The petitioner's situation in this case is by no stretch of reasoning comparable to that of the landlord claimant in *Irving Trust Co.* v. *Perry,* 293 U. S. 307. The covenant there given effect to provided that, in the event of the bankruptcy of the tenant, the lease should *ipso facto* terminate and the tenant thereupon be liable to pay liquidated damages. Here it would not have been until ten years after the bankruptcy that the precipitating cause of damage to the petitioner could have occurred and not until eighty years later that the effect of such damage could have been felt.

But even if a claim on the building covenant might, as a claim then provable, have escaped the release on account of the qualification, the Debtor's liability under the building covenant ceased to exist for other reasons long prior to Section 77B. To begin with, as stated in the concurring opinion below (R. 183), such a claim would be "merged in or satisfied by the provision for liquidated damages", which, as we have seen, became operative in December, 1932. Moreover, in causing the lease to be assigned to her nominee at that time, the petitioner expressly assumed the performance of all existing and future obligations required on the part of the Debtor, and as soon as the lease was assigned it was modified to delete entirely all provisions with respect to the demolition of the present building and the erection of a new one. In this way the petitioner herself destroyed the basis for any claim against the Debtor based on the building covenant, before such a claim ever existed.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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